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No. 99-2036

In The
Supreme Court of the United States

THE GOOD NEWS CLUB, ET AL.,
Petitioners,
v.
MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United has approximately 60,000 members nationwide and maintains active chapters in several states. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court.

American Civil Liberties Union and New York Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our country's civil rights laws. The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU. This case once again presents the Court with an alleged conflict between free speech rights and Establishment Clause obligations. As an organization deeply committed to both constitutional values, the ACLU believes that such cases must necessarily turn on the facts. Based on the facts, the ACLU supported the free

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[1]Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

speech interest in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), and Capitol Square Review Board v. Pinette, 515 U.S. 753 (1995). On the other hand, the ACLU supported the Establishment Clause interest in Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), and Board of Education v. Mergens, 496 U.S. 226 (1990). In this case, the ACLU is persuaded that the totality of circumstances presents an unconstitutional risk that church and state will be impermissibly linked in the minds of the young schoolchildren involved. Accordingly, the ACLU respectfully submits this *amicus* brief in support of the respondent.

American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC strongly supports the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, AJC believes, protects the religious freedom of members of minority faiths; protects the freedom of conscience of non-believers; and protects the government from debilitating power struggles among religious groups. AJC has participated as *amicus* in a wide array of cases in support of this vital principle.

People For the American Way Foundation

People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and

constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has more than 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. People For joins in this *amicus* brief in order to help vindicate the important First Amendment principle prohibiting government endorsement of religion.

SUMMARY OF ARGUMENT

This case calls for the Court to delineate the margins of its holding in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), in which the Court held that the Free Speech Clause required, and the Establishment Clause did not prohibit, the provision of access to a public high school auditorium by a religious group. Several of the undersigned *amici* submitted a brief in Lamb's Chapel in support of the Court's holding because various factors in the case combined to ensure that a reasonable observer would not perceive the religious activity at issue to be endorsed or sponsored by the school.[2]

The overwhelming lack of these factors in this case counsels the opposite result. Lamb's Chapel involved use of a public school during the evening hours; this case involves access shortly before the end of the school day and

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[2]A brief taking this position was jointly submitted by Americans United for Separation of Church and State, the American Civil Liberties Union, and People For the American Way Foundation.

immediately thereafter. The event in Lamb's Chapel was open to all members of the community, while the audience in this instance is limited to the school's elementary students. That case involved weekly use for five weeks; this one involves weekly use throughout the school year. That case involved similar uses by scores of community groups while, here, there are less than a handful of other outside groups, and not a single one of them holds meetings at the time requested by the Good News Club. In Lamb's Chapel, no school employee was involved in the showing of the film; in this case, it can be reasonably assumed that the age of the children and the timing of the meetings would necessitate the school's involvement and facilitation. Finally, that case involved the showing of a film series, while this one involves adults teaching a class using a format that is indistinguishable from typical classroom instruction.

These differences, in combination, create a seamless web between classroom instruction and religious indoctrination, such that a reasonable elementary school student would be unable to appreciate that the former instruction is school-sponsored while the latter is not. Accordingly, the requested access is proscribed by the Establishment Clause and was therefore properly denied.[3]

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[3]The Good News Club's application was denied pursuant to a Community Use Policy that prohibits the use of school premises "by any individual or organization for religious purposes." See Good News Club v. Milford Cent. Sch., 202 F.3d 502, 504 (2d Cir. 2000). While *amici* believe that the denial was justified because the Establishment Clause disallows the particular use in question, *amici* also believe that the literal language of the Community Use Policy raises free speech concerns to the extent that it prohibits greater amounts of speech

(continued...)

ARGUMENT

I. The Inter-Relationship Between the Free Speech and Establishment Clauses

A. The Free Speech Clause

In determining the extent to which government is required to allow access to its property and other avenues of communication, this Court employs a "forum analysis" that divides property into four categories: (1) traditional public fora; (2) designated public fora; (3) nonpublic fora; and (4) non-fora. See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676-80 (1998).

Traditional public fora are those that the government has made available for expressive activity by long tradition or government fiat. See id. at 677. In such fora, a content-based exclusion is justified only when it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that interest. See id.

Designated public fora arise when government takes purposeful action to open otherwise closed fora for public discourse. See id. If government makes the property available for indiscriminate use by the public, exclusions are evaluated under the same standards as apply in a traditional public forum. See Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

Two types of fora -- those made available for use by certain speakers or for the discussion of certain subjects, which have often been referred to as "limited public fora" -- have not been consistently categorized. At times, the Court

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[3](...continued)
than is constitutionally permitted.

has categorized such fora as types of nonpublic fora, see, e.g., Lamb's Chapel, 508 U.S. at 393 (1993); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985); at other times, the Court has deemed them to be forms of designated public fora, see, e.g., Perry, 460 U.S. at 46 n.7; and at still other times, the Court has referred to speaker-limited fora as designated fora, and to subject-limited fora as nonpublic fora. See Arkansas, 523 U.S. at 677-78; International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992).

Despite this confusion, however, the standards that are applicable to restrictions on the use of limited public fora have become fairly clear in recent years. In a forum that is limited to a certain class of speakers, a content-based exclusion of a speaker who falls into the designated class is subject to strict scrutiny. See Arkansas, 523 U.S. at 677; Widmar v. Vincent, 454 U.S. 263, 269-70 (1981). Furthermore, in both speaker-limited fora and subject-limited fora, categorical distinctions must be reasonable in light of the purpose served by the forum. See Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel, 508 U.S. at 392-93. Finally, in both kinds of limited public fora, a viewpoint-based distinction will be upheld only if it is necessary to satisfy a compelling interest, such as compliance with the Establishment Clause. See Rosenberger, 515 U.S. at 837 (a viewpoint-based distinction is "excused by the necessity of complying with the Constitution's prohibition against state establishment of religion"); Lamb's Chapel, 508 U.S. at 394 ("[T]he interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech.") (internal quotation marks and brackets omitted); cf. Widmar, 454 U.S. at 271 ("[T]he interest of the University in complying with its constitutional obligations may be

characterized as compelling."); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) ("[C]ompliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.").

In this case, the parties have agreed that the forum to which the plaintiffs seek access is a limited public forum. See Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 153 (N.D.N.Y. 1998), aff'd, 202 F.3d 502 (2d Cir. 2000). However, the parties disagree on whether the exclusion of the Good News Club was based on content or viewpoint and, therefore, whether the operative test is one of reasonableness or strict scrutiny. In resolving this dispute, the lower courts sided with the Respondent, finding that the distinction between religious worship and instruction on the one hand, and speech from a religious viewpoint on the other, is one of content rather than viewpoint. See Good News, 202 F.3d at 511; Good News, 21 F. Supp. at 158.

Amici take no position on the lower courts' rationale. Rather, *amici* argue that the disallowance of the Good News Club meetings, under the requested terms, is necessitated by the Establishment Clause, and was therefore proper under even a strict scrutiny standard.

B. The Establishment Clause

A policy complies with the Establishment Clause if it has a secular purpose and does not advance or inhibit religion in its principal or primary effect. See Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000) (plurality); id. at 2560 (O'Connor, J., concurring); Agostini v. Felton, 521 U.S. 203, 222-23 (1997). A policy will be found to violate the effects prong of this test if a reasonable observer would perceive it to endorse religion. See County of Allegheny v. ACLU, 492 U.S. 573,

592 (1989); Agostini, 521 U.S. at 235; Lamb's Chapel, 508 U.S. at 395. By "endorsement," the Court is referring to governmental action that "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *favored or preferred*." Allegheny, 521 U.S. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)). The Court has stated this principle thus:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Id. at 593-94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). "[G]overnment practices relating to speech on religious topics 'must be subjected to careful judicial scrutiny,' and [] the endorsement test supplies an appropriate standard for that inquiry." Pinette, 515 U.S. at 778 (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 694 (O'Connor, J., concurring)).

Since its inception, the endorsement test has been concerned with both perceived and actual endorsement of religious speech. Thus, in the first case in which the test commanded a majority of the Court, the Court stated that "[t]he Establishment Clause, at the very least, prohibits government from *appearing to take a position on questions of religious belief*." Allegheny, 492 U.S. at 593-94 (emphasis added). A concern with the appearance of endorsement has played a significant, and recurrent, role in subsequent

decisions. See Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2278 (2000) (noting that a constitutional violation can rest on "actual or perceived endorsement"); Rosenberger, 515 U.S. at 850 (O'Connor, J., concurring) (addressing whether there is a "danger that the message of any one publication is perceived as endorsed by the University"); Lamb's Chapel, 508 U.S. at 395 (asking whether there is a "realistic danger that the community would think that the District was endorsing religion or any particular creed"); Widmar, 454 U.S. at 277 n. 14 (addressing whether students "could draw any reasonable inference" of government support).[4] Thus, the allowance of Good News Club meetings would violate the Establishment Clause if a reasonable observer would perceive the meetings to be endorsed by the school.

C. Reconciling the Free Speech and Establishment Clauses

Private speech that takes place in a public forum -- whether limited or unlimited -- is not normally deemed to be endorsed by the government. See, e.g., Widmar, 454 U.S. at 274; Lamb's Chapel, 508 U.S. at 395; Rosenberger, 515 U.S. 819. In the vast majority of cases involving a public forum, the nature of the forum -- the terms of its availability and its

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[4]A concern for both actual and perceived bias is common in legal standards that are designed to maintain and preserve institutional integrity and respect. Thus, the Federal Election Campaign Act is targeted at the prevention of both actual and apparent corruption of the political process. See Buckley v. Valeo, 424 U.S. 1, 53 (1976). Similarly, the Due Process Clause is concerned not only with fairness in meting out justice, but also with "the appearance of justice." Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994).

use by a wide variety of persons or organizations -- is such that a reasonable observer is unlikely to perceive governmental endorsement of the speech that takes place there. See Rosenberger, 515 U.S. at 850 (O'Connor, J., concurring) ("The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University."); Lamb's Chapel, 508 U.S. at 395 (there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed" when a forum is used by a wide variety of private organizations); Widmar, 454 U.S. at 277 n.14 ("In light of the large number of groups meeting on campus . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place.").

However, where the nature of a particular forum departs from the norm, and fosters rather than dispels the perception of government endorsement, the opposite conclusion is warranted:

> Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement. At

> some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. Other circumstances may produce the same effect -- whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise.

Pinette, 515 U.S. at 777-78 (O'Connor, J., concurring) (citations omitted); see also id. at 772 (O'Connor, J., concurring) ("I see no necessity to carve out . . . an exception to the endorsement test for the public forum context."); id. at 775 (O'Connor, J., concurring) ("[O]ur prior cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue."); id. at 784-92 (Souter, J., concurring) (a mistaken, but reasonable, perception of governmental endorsement of speech that takes place in a public forum necessitates a finding of an Establishment Clause violation); Santa Fe, 120 S. Ct. at 2275 n.13 ("[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.").

In this case, the forum in question is a public school, and the target audience for the message is the school's youngest children. If, as the Court has recognized, forbidden endorsement can occur in a full-fledged, traditional public forum such as a public park of sidewalk, where the messages are aimed at the public at large, surely it can occur in the context of an event held in a public elementary school that is aimed at an audience of impressionable young children. Such

a situation has arisen in this case.

II. A Reasonable Child Would Perceive School Endorsement If Good News Club Meetings Were to Take Place Under the Requested Conditions.

In Lamb's Chapel, this Court concluded, after engaging in a fact-intensive inquiry, that the circumstances were such that no reasonable observer would perceive the school to be endorsing the events in question. See 508 U.S. at 395. The circumstances in this case depart from those of Lamb's Chapel in virtually all salient respects; in this case, the cumulative effect of various factors counsels the opposite conclusion. Each of these factors will be addressed in turn below.[5]

- ***The children in question are aged six to twelve.***

The vantage point from which endorsement is evaluated is that of the reasonable, objective observer of the message in question. See Santa Fe, 120 S. Ct. at 2278; Pinette, 515 U.S. at 778 (O'Connor, J., concurring). In this case, the target audience for the Good News Club's message is children in kindergarten through seventh grade, who range

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[5]This would be a very different case, and *amici* could well come out the other way, if the totality of circumstances were different. Forbidden endorsement may occur under one set of facts but be lacking under a different, but closely related, set of facts. See Allegheny, 492 U.S. at 629 ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice.") (O'Connor, J., concurring).

in age from six to twelve. See S. Fournier Depo., J.A. at P19; Good News Club, 21 F. Supp. 2d at 149. It is through the eyes of these students that endorsement must be gauged. See Santa Fe, 120 S. Ct. at 2278 (the relevant reasonable observer of a high school graduation as "an objective Santa Fe High School student"); Board of Educ. v. Mergens, 496 U.S. 226, 249-52 (1990) (the relevant reasonable observer of clubs formed under the Equal Access Act is a secondary school student);[6] cf. Lamb's Chapel, 508 U.S. at 395 (the reasonable observer of an event that is open to the public is a member of the community).

The age of the children involved sets this case apart from all of the other access cases that the Court has decided to date. See Rosenberger, 515 U.S. at 823 (university students); Mergens, 496 U.S. at 250 (high school students); Widmar, 454 U.S. at 276 n.14 (university students); cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 384 (2d Cir. 1992) (community event held at

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[6]Some of the petitioner's *amici* disregard these cases and argue that the reasonable observer in this instance is a member of the community, rather than a child at the school. See Liberty Legal Inst. *Amicus* Br. at 15-19; Child Evangelism Fellowship *Amici* Br. at 7-19. While it is true that adult members of the community *may* become aware of Good News Club meetings that are held at the school, it is *certain* that the students who are invited to attend the meetings will do so. Indeed, the petitioner's *amici* ask the Court to disregard the perceptions of the very persons to whom the Good News Club directs its message. This request lacks a legal basis; the most that can be said for it is that there are two types of observers that have constitutional significance in this case. Because children are the more impressionable of the two, it is their perceptions that give rise to the greatest concern and the focus of this brief.

high school), rev'd, 508 U.S. 384 (1992). This factor has been pivotal to the Court's holdings in this area. In Widmar, 454 U.S. at 274 n.14, the Court observed that:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

Similarly, in Mergens, the Court relied on research in adolescent psychology to conclude that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250 (citing Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools, 92 Yale L.J. 499, 507-09 (1983) (summarizing this research)).

These observations have little meaning without recognition that pre-adolescent children, such as those in question here, are unable to appreciate this sophisticated distinction. Indeed, the research that the Court cited in Mergens, 496 U.S. at 250, demonstrates that the cognitive development required to make this distinction does not occur until adolescence. See Note, supra, at nn.42-44.

According to research by Jean Piaget, it is not until adolescence that a child's cognitive development is sufficient to allow him to think on an abstract, logical level, to reason by hypothesis, and to engage in independent analysis. See id. at n.42 (citing Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969)). Indeed, before this stage, a child lacks the ability to make distinctions between his views, others' views, and the views of his school. See Note, supra, at n.44 (citing

E. Erickson, Identity: Youth and Crisis 28, 30, 159-65, 246-47 (1968) (it is during adolescence that a child begins to form a coherent sense of self, which enables him to make distinctions between his views and the views of others)).[7] The capacity to appreciate the distinction between the school's views and the views of the groups that meet at the school is a necessary prerequisite to an appreciation of the distinction between neutrality and sponsorship, and it is one that is lacking in a pre-adolescent child.

It is for this reason that the United States Congress limited the Equal Access Act, which allows students to form religious clubs, to secondary schools. See 20 U.S.C. §§ 4071-74 (1994). The original draft of that bill applied to both elementary and secondary schools but, after hearings were held on the bill, elementary schools were omitted from coverage. See H.R. Rep. No. 98-710, at 2 (1984.); cf. S. Rep. No. 98-357, at 34 (1984) (quoting passage from court decision addressing maturity of high school students in contrast to elementary school students).[8] Because this

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[7] Thus, it would be entirely ineffective for the school to issue a "disclaimer" informing students that it does not endorse the Good News Club. A six-year-old may well be able to appreciate that something is "good" or "bad," but appreciating the shades of gray that fall between these two extremes requires a level of sophistication that such a young child is unlikely to have developed.

[8] Several witnesses testified at the hearings on the initial bill that elementary school children are unable to appreciate the distinction between neutrality and sponsorship, that they lack the maturity to undertake action without school supervision and involvement, and that they are particularly impressionable and

(continued...)

amendment was based in part on empirical determinations, see Mergens, 496 U.S. at 251, its import and relevance to the case at hand should not be lightly cast aside. See id.

Petitioners and their *amici* argue that perceptions are a "two-way street," so that a child who perceives endorsement from the meetings is likely to perceive hostility from their disallowance. See, e.g., Pet.'s Br. at 35; Laycock *Amicus* Br. at 5, 26-28; Liberty Legal Inst. *Amicus* Br. at 3, 12-15; Nat'l Council of Churches *Amici* Br. at 20. But disallowing the Good News Club meetings from proceeding under these circumstances is no more "hostile" to religion than the exclusion of school-endorsed prayer from the public schools, the prohibition against unobjective Bible study in the schools, and the prohibition against all other forms of religious speech

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[8](...continued)
subject to coercion and manipulation by others. See The Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the Comm. on Educ. and Labor, 98th Cong. (1983). At hearings on the amended bill, Professor Laurence Tribe supported the omission of elementary schools, stating that "the line between what is officially sanctioned, what is authorized, what is mandated may be so hard to draw" for children in the early grades, and "the impressionability and potential for coercion of very young children [is] so serious a problem." Religious Speech Protection Act: Hearings on H.R. 4996 Before Subcomm. on Elementary, Secondary, and Vocational Educ. of the Comm. on Educ. and Labor, 98th Cong. 48 (1984). Similarly, James M. Dunn, the Executive Director of the Baptist Joint Committee on Public Affairs, testified that elementary schoolchildren are limited in their "maturity of understanding" so that any "group religious activities of elementary school children facially would violate the establishment clause of the First Amendment." Id. at 33.

in contexts that are, or that appear to be, endorsed by the government. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (excluding school-endorsed prayer manifests "strict neutrality" rather than "hostility to religion"). This is because "the Establishment Clause requires the State to distinguish between 'religious' speech . . . and 'nonreligious' speech. . . . This distinction is required by the plain text of the Constitution." Widmar, 454 U.S. at 271 n.9. Thus, in situations that entail actual or perceived endorsement, a prohibition on religious speech reflects a respect for neutrality rather than a disrespect for religion.

- **Children aged 6-12** ***would be made available by the school immediately upon the conclusion of the school day.***

The Good News Club seeks to enter the school at 2:30 p.m., before the conclusion of the school day at 2:54 p.m. (see Resp.'s Br.), and to begin its classes at 3 p.m., a mere six minutes after the school day ends. See Use of Facilities Request Form, J.A. at W1. This request is patently designed to gain access to children who are at the school in plentiful and consistent numbers as a result of mandatory attendance laws. Good News Club teacher Darlene Fournier testified that she wants the club to meet at the school because the children are already there and it is thus "easier for the parents." D. Fournier Depo., J.A. at P100-P101. The efficacy of this strategy is demonstrated by the fact that when the club met at a local church, eight to ten students participated; but when it was moved to the school, more than twenty students did so. See S. Fournier Depo., J.A. at P12.

The timing of Good News Club meetings stands in sharp contrast to the events at issue in Lamb's Chapel, which

took place from 7 to 10 p.m. in the evening. See Lamb's Chapel, 959 F.2d at 384.[9] Here, the seamless transition from

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[9]The timing of the Good News Club meetings also sets this case apart from lower court decisions in this context, none of which involves a request to meet with elementary schoolchildren immediately upon the conclusion of the school day. See Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 209-11 (access to middle school for Sunday event), cert. denied, 523 U.S. 1074 (1998); Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 705 (4th Cir. 1994) (Sunday use for community event); Good News/Good Sports Club v. School Dist., 28 F.3d 1501, 1502 (8th Cir. 1994) (event at junior high school for junior high school students); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1369 (3d Cir. 1990) (evening use of high school facilities); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676, 677 (2d Cir. 1988) (Sunday event for community at large); Campbell v. St. Tammany Parish Sch. Bd., No. Civ. A 98-2605, 1999 WL 562736 at *1 (E.D. La. July 30, 1999) (evening use for community event), rev'd, 206 F.3d 482 (5th Cir. 2000); Liberty Christian Ctr., Inc. v. Board of Educ., 8 F. Supp. 2d 176, 180 (N.D.N.Y. 1998) (Saturday use of high school facilities); Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp. 2d 178, 181 (N.D.N.Y. 1998) (use of high school facilities for community event); Full Gospel Tabernacle v. Community Sch. Dist. 27, 979 F. Supp. 214, 216 (S.D.N.Y. 1997) (Sunday use for community event), aff'd, 164 F.3d 829 (2d Cir.), cert denied, 527 U.S. 1036 (1999); Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704, 706 (M.D. Ala. 1991) (Sunday event for high school students and their families); Randall v. Pegan, 765 F. Supp. 793, 794 (W.D.N.Y. 1991) (evening event for high school (continued...)

the instructional day to the Good News Club meetings would leave a reasonable elementary school student, who has the typical, limited cognitive abilities of students this age, unable to make the sophisticated distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Mergens, 496 U.S. at 250.

Furthermore, according to the Respondent's brief, in this case no other outside group meets at the school before 5 p.m. The unique nature of the Good News Club's meeting time renders the message of school endorsement even more pronounced. Indeed, allowing the meetings to take place at the requested time would entail special treatment that would cause a reasonable student to perceive that the school has a *preference* for this group over others.

- **Children aged 6-12 would be made available by the school immediately upon the conclusion of the school day *to two adults who have an ongoing presence at the school.***

It is undisputed that the Good News Club meetings will be led by adults; they are not student-initiated. See Pet.'s Br. at 7. Young children perceive adults as authority figures; it is not until adolescence that a child begins to set aside his

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[9](...continued)
students and their parents); Wallace v. Washoe County Sch. Dist., 818 F. Supp. 1346, 1348 (D. Nev. 1991) (Sunday use of high school for community event); Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944, 947 (N.J. 1978) (evening and Sunday use).

belief in the infallibility of adult authority. See Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public Schools, 92 Yale L.J. 499 at n.42 (1983) (citing Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969)). It is at this stage that a child begins to form a coherent sense of self and, in the process, begins to question and challenge the authority figures of his childhood. See id. at n.44 (citing E. Erikson, Identity: Youth and Crisis 28, 30, 259-65, 246-47 (1968)).

Given the undeveloped nature of their cognitive abilities, it is very unlikely that an elementary school student would be able to discern that one authority figure who teaches at the school on an ongoing basis -- the Good News Club teacher -- speaks on behalf of herself, while other authority figures -- those who teach before 2:54 p.m. -- speak on behalf of the school.

In recognition of the influence that adults have over students, even those older than the ones at issue here, the United States Congress included a provision in the Equal Access Act that provides that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071(c)(5). This Court relied in part on this prohibition in upholding the Equal Access Act against constitutional attack. See Mergens, 496 U.S. at 253.

Furthermore, elementary school age children reasonably believe that outsiders who come into the school do so with the school's approval. This is so to a much greater extent than in high schools. In fact, Superintendent Livshin testified at his deposition that District policy charges him with approving or disapproving all afterschool use of school facilities, and that he exercises substantial discretion in fulfilling this responsibility. See Livshin Depo., JA at N14, N19-N20. Thus, all outsiders on school premises after the

school day are, in fact, there with school approval, further contributing to an appearance of endorsement on the part of the school. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269-74 (1988) (journalism teacher's exercise of editorial control was such that members of the public would, in this Court's view, reasonably perceive the newspaper to bear the imprimatur of the school).

The inability of young children to discern an authority figure's source of authority, the degree of discretion that is exercised over the access process, and the greater need of young schoolchildren for protection from outsiders all contribute to a reasonable student's perception that those who are granted access to the school bear the school's imprimatur.

- **Children aged 6-12 would be made available by the school immediately upon the conclusion of the school day, *on a weekly basis for the entire school year,* to two adults who have an ongoing presence at the school.**

The Good News Club seeks access to the school to hold a class every Tuesday throughout the school year. See Use of Facilities Request Form, J.A. at W1. Thus, the duration of the requested access is analogous to classroom instruction, thereby further diminishing a child's ability to distinguish one from the other. In contrast, in Lamb's Chapel, the use was of a much more limited duration -- one evening per week for five weeks -- which would enhance a student's ability to distinguish the film events from classroom instruction. See 959 F.2d at 384.

- **Children aged 6-12 *would likely be escorted by their school teachers*, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to a class conducted by two adults who have an ongoing presence at the school.**

Although the record is silent on this point, it is reasonable to assume that the age of the children involved in this case would necessitate the school's facilitation of the Good News Club meetings through dissemination and monitoring of parental permission slips, distribution of information about the meetings, shepherding children to the class, and various other facilitative activities. See J.A. at X2 (copy of parental permission slip submitted to school by Good News Club); Pet.'s Br. at 7 (noting that parental permission is required for a child to attend meetings). A child who is sent home with a permission slip, much like the one his parents complete to allow him to participate in a school-sponsored field trip, is likely to perceive this as the school's promotion of the event.[10]

Professor Laycock argues that endorsement is not present in this case because endorsement "must be based on something the government did," rather than on the government's passive, non-preferential grant of access to a forum available to others. Laycock *Amicus* Br. at 28. That argument is misguided in this case in two respects.

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[10]The students' impression of endorsement would be increased even further if the Good News Club's meetings were advertised through the school newspaper, bulletin boards, the public address system, and other resources available for the dissemination of information, as contemplated in Mergens, 496 U.S. at 247.

First, by Professor Laycock's own standard, the school's behavior amounts to endorsement, as its role in this case would be far from passive or non-preferential. While high school children may be able to take initiative, to walk from one class to the next without teacher supervision, and to disseminate and monitor parental permission slips, elementary schoolchildren cannot assume this level of responsibility and it is therefore reasonable to assume that the role that an elementary school must play to facilitate meetings is substantially greater than that required in a high school. By undertaking this facilitation, mandating children's attendance at school, and then allowing an outside group to come in *before* the end of the school day at a time when no other groups are granted access, the school's role in this case would be both active and preferential.

Second, Professor Laycock blurs the distinction between actual and perceived endorsement. He spends the bulk of his *amicus* brief asserting that *actual* endorsement of a message occurs only when the government selects, delivers, encourages, arranges for, or grants preferential access to the message. See Laycock *Amicus* Br. at 9-11. When he addresses the "branch" of the endorsement test that focuses on *perceived* endorsement, Professor Laycock states that the "observer's perception must be based on . . . some form of preferential treatment for religious speech -- some special privilege, or some manipulation of process to ensure that the religious speaker gets an advantage." See id. at 28-29. But by his own terms, preferential treatment is a form of *actual* endorsement; under Professor Laycock's formulation, the perceived endorsement branch of the endorsement test is superfluous and he has, in effect, cut it off the tree.

The conflation of perceived endorsement with preferential access cannot be reconciled with the rationale that underlies the endorsement test. See Pinette, 515 U.S. at

787 (Souter, J., concurring) (limiting endorsement to government expression or favoritism would render meaningless the Establishment Clause's concern with the "effects" of government action); id. at 799 (Stevens, J., dissenting) (a prohibition on endorsement in appearance, if not in fact, gives effect to the paramount purpose of the Establishment Clause of protecting persons from being made to feel like outsiders in matters of faith, and strangers in the political community). For this reason, a majority of the Court has explicitly rejected Professor Laycock's formulation of the perceived endorsement test. See id. at 777 (O'Connor, J., concurring) ("The [Establishment] Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.") (citations omitted); id. at 807-10 (Stevens, J., dissenting) (the Establishment Clause proscribes situations in which some reasonable observers would attribute a religious message to the State, even though the State has shown no preference for this message over non-religious ones).

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, *to join other students from the school* in attending a class that is taught by two adults who have an ongoing presence at the school.**

The target audience for the Good News Club meetings is schoolchildren, rather than all members of the community. See Pet.'s Br. at 9. In Lamb's Chapel, the Court

found no danger that the community would perceive school endorsement because the events in question "would have been open to the public, not just to church members." 508 U.S. at 395; see also Pinette, 515 U.S. at 767 (Scalia, J., writing for a plurality) (noting that access was constitutionally permissible in Lamb's Chapel in part because "the event was open to the public").

The inclusion of non-school persons in the audience of an event that takes place at a public school places some distance between the school and the event, thereby minimizing any impression of school-sponsorship; opening the event to the community at large does so to an even greater degree. The lack of any "buffer zone" factors in this case increases the nexus between the Good News Club meetings and the school, and thereby fosters the impression of school-sponsorship, particularly in the mind of a young, impressionable child.

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to join other students from the school in attending a class that is taught by two adults who have an ongoing presence at the school, *using a format that is indistinguishable from that of typical classroom instruction*.**

Each Good News Club class is led by a teacher who is guided by formal lesson materials, see Good News, 21 F. Supp. 2d at 155, the classes follow a format in which students are rewarded for good behavior, see Depo. of S. Fournier, J.A. at P22, and classes end with a homework assignment. See Good News, 21 F. Supp. 2d at 154, 157 (noting that class

ends with distribution of Bible verses for memorization).[11] In Lamb's Chapel, the requested use did not follow this format; rather, it involved a six-part film series, held during the evening, and open to the public at large. See 508 U.S. at 387, 395. Because of the timing, audience, and nature of the event, a student attending the Lamb's Chapel events would be highly unlikely to mistake them for classroom instruction. In contrast, the similarities between the Good News Club meetings and regular classroom instruction render one virtually indistinguishable from the other to a pre-adolescent child.

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to join other students from the school in attending a class that is taught by two adults who have an ongoing presence at the school, using a format that is indistinguishable from that of typical classroom instruction, *at a time when no other groups are meeting*.**

The record makes reference to only three student groups that avail themselves of the school's facilities: Boy Scouts, Girl Scouts and 4H Club. See Good News, 21 F. Supp. at 154; Pet.'s Br. at 5-6, 17 n.3. Furthermore,

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[11]In addition, the meetings that took place during the course of the preliminary injunction were held in a room that is used for instruction during the school day, see Livshin Depo., J.A. at N12-N13, rather than in the cafeteria as the Good News Club originally requested. See Use of Facilities Request Form, J.A. at W1.

according to the Respondent's brief, none of these groups, nor any others, holds its meetings immediately after the school day.

This stands in sharp contrast to Lamb's Chapel, 508 U.S. at 391, where "the District's property is heavily used by a wide variety of private organizations"; to Rosenberger, 515 U.S. at 825, where 118 student groups had received funding under the program in question; to Mergens, 496 U.S. at 231, where there were 30 recognized students clubs from which students could choose;[12] to Widmar, 434 U.S. at 277, where there were over 100 recognized student groups; and to Pinette, 515 U.S. at 757, where the square in question had been used for a variety of speeches, gatherings, and festivals for over a century.

The number and breadth of other uses has been an important factor in the Court's decisions. Thus, in Mergens, the Court stated as follows:

> [T]he broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs counteract any possible message of official endorsement of or preference for religion or a particular religious belief. To the extent that a religious

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[12]In passing the Equal Access Act, Congress found that the students' impression of school endorsement will be diminished because "[a]ny . . . student desiring to participate [in a student-initiated religious club] would . . . have to reject the various other secular activities available to him and go to the room where those few other students who have a common interest would be meeting for religious activities." S. Rep. No. 98-357, at 28 (1984).

> club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.

Mergens, 496 U.S. at 252 (citation omitted).

In the absence of a truly robust forum that includes the participation of several advocacy-oriented groups, the presence of a religious club provides a fertile ground for peer pressure. It is precisely in a school without a robust forum that the non-representation of other groups is most coercive, and that a student who does not share the religion of his classmates is likely to believe that his religion is disfavored.

In Mergens, the Court recognized the possibility of peer pressure, but dismissed it on the ground that any such pressure is not "official" because no formal classroom activities are involved and no school officials actively participate. See 496 U.S. at 251. This argument may be persuasive where the children involved are able to understand the difference between the government and private actors, and where students are old enough to have a sense of control and responsibility over their own time and whereabouts before and after the school day. However, where children, because of their young age, are unable to appreciate this distinction, and are highly dependent on adults for every aspect of their existence at school -- before, during, *and* upon the conclusion of the school day -- this argument loses much of its force. In the latter setting, the state cannot disclaim its responsibility for the students' presence at the school, the peer pressures that pertain to afterschool activities,[13] and the

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[13]Research on child psychology demonstrates that peer pressure carries far greater weight among younger children than (continued...)

messages that the school's behavior reasonably conveys to the children in its charge.[14]

Conclusion

No child between the ages of six to twelve, under the circumstances of this case, can reasonably be expected to appreciate that, despite all of the similarities between Good

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[13](...continued)
among those aged fourteen or older: "[C]onformity is at its height among the early adolescent group but [] it diminishes significantly from about fourteen or fifteen onward." Note, The Constitutional Dimensions of Student-Initiated Religious Activity in the Public High Schools, 92 Yale L.J. 499 at n.43 (1983) (citing Coleman, Friendship and the Peer Group in Adolescence, in Handbook of Adolescent Psychology 424-25 (J. Adelson ed., 1980)).

[14]Because of the existence of Second Circuit precedent limiting the breadth of the factual inquiry necessary in a case of this kind, the record in this case is largely undeveloped. For example, no specific evidence was presented to the Court below regarding the times at which other student groups meet, the role played by the school to facilitate the meetings that took place during the time that the preliminary injunction was in effect, and the impressionability of young children. If the Court finds that the paucity of the factual record renders it unable to determine whether an elementary school student would perceive endorsement of the Good News Club meetings, the Court should remand the case for development of additional facts relevant to the endorsement inquiry. See Lynch, 465 U.S. at 693-694 (O'Connor, J., concurring) (endorsement entails both a factual and legal assessment).

News Club classes and his or her other classes, the latter, but not the former, are school-sponsored. Accordingly, *amici* urge the Court to affirm the decision of the court below.

Respectfully submitted,

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